No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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As the petition established, the courts of appeals are intractably divided over an important and recurring question of federal criminal law: whether 18 U.S.C. 3663A(b)(4) authorizes restitution for a company's internal investigation and other expenses that were neither required nor requested by the government.

In response, the government effectively concedes that review is warranted. It acknowledges that the circuits are squarely divided over this frequently recurring question. It does not dispute the issue's obvious importance, and it never doubts that this case is an ideal vehicle for resolving the issue.

Instead, the government offers two transparent attempts to avoid review, but each fails. Its primary retort—that the D.C. Circuit misconstrued Section 3663A(b)(4)—is a reason to *grant* review, not deny it. And

even on that front, the government barely recognizes that each of its arguments has been explicitly refuted by Judge Kavanaugh's opinion, Judge Berzon's dissent, or Judge Higginson's concurrence. This sharp disagreement (which the government's brief reaffirms) will not be resolved without this Court's intervention.

Aside from jumping the gun on the merits, the government posits that, at some future point, in some hypothetical case, the D.C. Circuit may theoretically reach a similar result under Section 3663A(b)*(1)*. This is thin gruel. The government again ignores that the D.C. Circuit's operative rationale effectively rejected that outcome; the government's new theory thus would fail just as quickly as its old one. Moreover, the government concedes that multiple circuits already allow these expenses under Section 3663A(b)(4), and thus have no reason to address the government's implausible new argument. There is no excuse for giving the government a free pass to secure restitution under an (incorrect) reading of Section 3663A(b)(4), simply because the D.C. Circuit, inexplicably, could do an about-face, abandon *Papagno*, and adopt the government's (incorrect) reading of Section 3663A(b)(1).

At bottom, on the actual question presented, this case checks off every box for review, and nothing in the government's opposition undermines the urgent need to resolve this significant question. Under the existing split, lower courts will continue awarding substantial restitution without any basis in the statutory text. Review is warranted.

1. As the petition established, the circuit conflict is clear, undeniable, and entrenched. Pet. 10-23. The government does not dispute the existence of a square conflict, nor could it. Br. in Opp. 8, 9. The court of appeals

candidly acknowledged the conflict, which the D.C. Circuit (and multiple other circuits) have readily confirmed. See Pet. App. 4a-5a & n.2; *United States* v. *Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011). There is no debate that these courts have read the same provision in opposite ways, so that the costs of internal investigations and private expenses are included (or not) based on the jurisdiction of the prosecution.

Instead, the government admits that the conflict is real, but says it is "overwhelming[]" in its favor. Br. in Opp. 8. Yet the government does not deny that this Court regularly grants review to decide splits at least as "overwhelming" as this. Pet. 25 (providing multiple examples). And, in fact, the government's case is not nearly as strong as it suggests. Not only does the decision below conflict with *Papagno*'s clear holding, but the same issue has separately divided two other circuits. See Pet. 13-15 (describing Judge Higginson's Fifth Circuit concurrence, Pet. App. 6a-11a, and Judge Berzon's Ninth Circuit dissent, *United States* v. *Juvenile Female*, 296 F. App'x 547, 550-552 (9th Cir. 2008)). The disagreement is thus hardly shallow or isolated; appellate judges on two panels (Judge Berzon and Judge Higginson) have argued that the position in *Papagno* is correct, and other panels have simply acknowledged they are bound by prior circuit authority, despite recognizing *Papagno*'s narrower holding. See, *e.g.*, Pet. App. 5a ("Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here."); *United States* v. *Carpenter*, 841 F.3d 1057, 1061-1062 (8th Cir. 2016) (describing and rejecting *Papagno*); *United States* v. *Cuti*, 778 F.3d 83, 93, 96 n.5 (2d Cir. 2014) (acknowledging entrenched conflict with *Papagno*); see also Pet. 18-23 & nn.5-7 (outlining the open conflict and lack of movement on either side). The division is thus clear and meaningful,

and the government cannot simply cabin the D.C. Circuit as a lonely outlier.[1]

The government's claim of "overwhelming" support also falls flat aside from mere head-counting. Under any qualitative metric, the minority view is by far the more *developed* view. Indeed, as petitioner explained, Judge Kavanaugh's opinion in *Papagno* treats the issue in greater depth than any other opinion, followed only by Judge Berzon's dissent in *Juvenile Female* and Judge Higginson's separate opinion below. See Pet. 25 (making this point, without response from the government). These three opinions have systematically refuted the cursory views of other courts of appeals (Pet. 27-29), yet four of those circuits (without any meaningful response) have refused to back down (Pet. 18-23). This admitted conflict is thus significant, and this Court alone can ensure that this important criminal statute is applied uniformly nationwide.

2. Rather than contest any aspect of the ordinary certworthiness calculus (including the existence of a square conflict, the issue's importance, its frequent recurrence, or this case's suitability as a vehicle for resolving the split), the government instead offers two marginal responses. Each is insubstantial.[2]

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[1] Indeed, in attempting to minimize the conflict, the government completely ignores Judge Berzon's strong dissent, and brushes past Judge Higginson's (nominal) concurrence, without once grappling with either extended critique of the majority view. See Br. in Opp. iii, 6 (never citing *Juvenile Female*, and referencing, barely, Judge Higginson's opinion in the Statement, but not the Argument).

[2] *E.g.*, Br. in Opp. 6-7, 9, 11 (acknowledging conflict), 11 ("Victims in financial crimes not infrequently conduct their own investigations to determine what occurred before alerting and providing their investigatory fruits to authorities.").

a. First, according to the government, the decision below is correct and *Papagno*'s contrary analysis is wrong. Br. in Opp. 7-11. The fact that the government believes it should win on the merits is hardly a reason to *forgo* review of the merits. Quite the contrary, the sharp disagreement over Section 3663A(b)(4)'s scope only confirms the obvious certworthiness of this case.

Indeed, each core component of the government's merits position can be lined up with a direct *refutation* of that position in *Papagno*'s unanimous opinion, Judge Berzon's dissent, or Judge Higginson's "concurrence" below. Take, for example, the government's belief that "the investigation" in Section 3663A(b)(4) is not limited to *the government's* investigation. Br. in Opp. 10. That view was directly repudiated by *Papagno*, which explained that "the singular 'offense' * * * is of course the criminal offense of conviction," and thus "[t]he singular 'investigation or prosecution' of 'the offense' is * * * the [government's] criminal investigation and prosecution." 639 F.3d at 1097-1098; see also, *e.g.*, *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own").[3]

And the government's understanding of the statutory terms "participation" and "necessary" is self-avowedly at odds with *Papagno*'s reasoning, which the government simply rejects. Br. in Opp. 10-11 (resisting *Papagno*'s contrary analysis); compare Pet. App. 6a-7a (Higginson, J.,

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[3] Nor was this position merely "assumed." Contra Br. in Opp. 10. The panel reached this legal conclusion in the course of carefully examining Section 3663A's text, structure, purpose, and history. 639 F.3d at 1097-1101.

concurring) ("agree[ing] with the D.C. Circuit's persuasive interpretation of the statutory terms 'participation' and 'necessary,'" and "specifically, that 'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors'"; further bolstering the point with "the *noscitur a sociis* canon").[4]

Thus, the minority position may be in the minority, but it represents a clear, exhaustive rejoinder to the government's contrary analysis. And aside from insisting its theory is correct, the government failed to meaningfully engage the detailed analysis of the D.C. Circuit or the dissenting judges on other courts of appeals. This division only underscores the significant "divergen[ce]" (Br. in

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[4] The government argues that *Papagno*'s "restrictive understanding of Section 3663A(b)(4) loses sight" of the MVRA's "'purpose,'" which is "'to ensure that victims of a crime receive full restitution.'" Br. in Opp. 11 (quoting *Dolan* v. *United States*, 560 U.S. 605, 612 (2010)). But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Congress's purpose is ultimately reflected in the actual text. And if Congress truly meant to "ensure" that crime victims receive "full restitution," it would have written a simple, general statute that says exactly that—as opposed to a carefully delineated statute that limits restitution to specific enumerated categories. Compare, *e.g.*, 18 U.S.C. 2259(b)(3)(F) (broadly providing restitution for "any other losses suffered by the victim as a proximate result of the offense"). In any event, "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses"; "where criminal restitution statutes fall short, victims may bring their own civil actions to recover." Pet. App. 10a-11a (Higginson, J., concurring).

Opp. 11) over the proper reading of this important criminal statute. This Court alone can establish which interpretation is correct.[5]

b. Second, the government argues that, despite losing in *Papagno* under Section 3663A(b)(4), it might theoretically have won under Section 3663A(b)(1). And, according to the government, because such a hypothetical ruling in some future D.C. Circuit case could theoretically produce the same result as the one below, the admitted conflict (over the *actual* question presented involving the *actual* statutory provision at issue) is unworthy of review.

This is mere wishful thinking, and the government's speculation fails on multiple levels. For one, the government's argument cannot overcome *Papagno* itself, whose core rationale squarely repudiates the government's new theory.

According to the government, restitution is available under Section 3663A(b)(1) because the criminal fraud "'result[s] in' a victim's loss of property," which the government says includes subsequent investigation expenses. Br. in Opp. 7. But the property lost *from the offense* is the property *targeted in the offense* (*e.g.*, the unrecovered loan principal here, the stolen computer equipment in *Papagno*, etc.). That is the "property" that Section 3663A(b)(1) contemplates should be "return[ed] * * * to the owner." 18 U.S.C. 3663A(b)(1)(A). The offense

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[5] The government believes the D.C. Circuit should have written a narrower opinion than it actually did (Br. in Opp. 12), but that is wrong. The panel's "formulation" was its definitive construction of Section 3663A(b)(4), which assuredly *was* "necessary for the panel to resolve the case before it." *Ibid.* Indeed, it is entirely unclear how *Papagno* could have resolved that case—asking whether unprompted internal-investigation expenses were covered—without deciding the same question presented here.

itself did not *require* an internal investigation or other private costs, and the offense was complete with or without those subsequent expenditures. While "[i]t is true that [petitioner's] activities caused, in some Palsgrafian sense, the costs incurred by [GECC] for its internal investigation," those "consequential" costs are a step (or more) removed from the offense itself. *Papagno*, 639 F.3d at 1100.

That key rationale directly refutes the government's new theory. As *Papagno* explained, Section 3663A "is not a consequential damages statute." 639 F.3d at 1100; contra Br. in Opp. 13 (asking whether costs were "'a direct and foreseeable result'"). It recognized that "other[]" statutes provide more expansive coverage, but this one "does not afford a right to reimbursement for all costs caused in some sense by the defendant." *Ibid.* Its "text has a narrower focus," and "[w]e cannot distort the language of this statute to achieve an objective that its text does not reach." *Ibid.* It is thus hardly surprising that *Papagno* rejected, *by name*, the very decisions the government now invokes to support its Section 3663A(b)(1) argument. Compare Br. in Opp. 13 (citing *United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009), *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009), and *United States* v. *Scott*, 405 F.3d 615 (7th Cir. 2005)), with *Papagno*, 639 F.3d at 1101 ("respectfully disagree[ing]" with, *e.g.*, the "reasoning" of *Elson* and *Hosking*).[6]

Aside from this critical disconnect, the government's theory is incompatible with other aspects of *Papagno*'s analysis. For example, as *Papagno* recounted, Congress

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[6] While *Papagno* did not single out *Scott*, *Hosking* itself relied directly on *Scott* in its analysis; the two decisions, from the same circuit, stand for the same proposition. See 567 F.3d at 331-332. *Papagno* would accordingly reject them for the same reasons. 639 F.3d at 1101.

amended 18 U.S.C. 3663 in 2008 to cover "internal investigations" by "identity theft" victims, "even if the internal investigation was neither required nor requested by the criminal investigators or prosecutors." 639 F.3d at 1099 (describing 18 U.S.C. 3663(b)(6)). As *Papagno* explained, Congress's addition of Section 3663(b)(6) was necessary because Section 3663's *preexisting* sections—including Sections 3663(b)(1) and 3663(b)(4)—did not provide the same relief. *Id.* at 1099-1100. But Congress limited that new coverage to identify-theft victims, and "Congress did not add similar language to the mandatory restitution statute at issue in this case." *Id.* at 1099. Because "'it is generally presumed that Congress acts intentionally and purposely in [a] disparate inclusion or exclusion,'" this showed that Congress did not intend Section 3663A to "authorize restitution for costs of the kind associated with internal investigations." *Id.* at 1100 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010)). That logic, of course, applies equally to *all* provisions of the MVRA, including Section 3663A(b)(1). The government does not explain how the D.C. Circuit could suddenly adopt its Section 3663A(b)(1) argument without repudiating *Papagno*'s existing analysis.

In the end, the government's conjecture about what the D.C. Circuit, someday, might hold is simply that—*conjecture*. And it is especially implausible conjecture in light of the telltale signs that *Papagno* already forecloses the government's theory: the D.C. Circuit (i) squarely rejected the government's "consequential" damages point; (ii) expressly rejected the very decisions the government exclusively cites to support its theory; (iii) adopted reasoning (including its analysis of Section 3663(b)(6)) that is directly at odds with the government's approach; and (iv) did all this without overlooking Section 3663A(b)(1)—

which it specifically referenced in the opinion and reproduced in full in the opinion's appendix (639 F.3d at 1097, 1101-1102). It is simply fanciful to believe that the D.C. Circuit could adopt the government's view of Section 3663A(b)(1) without abandoning *Papagno* itself, in favor of the very decisions that *Papagno* "carefully considered" before "respectfully" parting ways. *Id.* at 1101. The government has no answer for any of these points, and its Hail Mary is plainly designed to avoid review of the *concrete* question that actually divides the circuits and was outcome-determinative below.[7]

Finally, the government overlooks a critical point: Given the "lopsided" nature of the split, the government is currently prevailing in multiple circuits on a theory that would undeniably fail in the D.C. Circuit (and under the dissenting views in two other courts of appeals). If the government believes that its aggressive, atextual reading of Section 3663A(b)(1) carries the day, it can always litigate that position in future courts. But it is currently getting a free pass, under a mistaken construction of Section

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[7] While it is sufficient that the D.C. Circuit would not adopt the government's aggressive reading of Section 3663A(b)(1), that reading has also been rejected by other circuits, which likewise refuse to shoehorn investigation expenses (which are already addressed by Section 3663A(b)(4)) into Section 3663A(b)(1), where they do not belong. See, *e.g.*, *United States* v. *Amato*, 540 F.3d 153, 161 (2d Cir. 2008) (Section 3663A(b)(1)'s "language deals with the restitution of lost or damaged property, not investigation or prosecution expenses"); cf. *United States* v. *Mullins*, 971 F.3d 1138, 1147 (4th Cir. 1992) ("restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property"). The government does not acknowledge this contrary authority in its brief.

3663A(b)(4), in every circuit adhering to the "broad" interpretation of that provision. This entrenched conflict warrants the Court's review.[8]

* * *

In the end, the government's response effectively confirms that review is warranted. It admits that the circuits are intractably divided, with neither side willing to budge. It acknowledges that the issue is frequently recurring, as it indisputably is. It does not contest the issue's obvious importance, producing disparate results in criminal cases with millions (or more) at stake. And it never doubts (or even *questions*) that this is an ideal vehicle for deciding the question. The government simply believes its reading, not *Papagno*'s, should prevail on plenary review (which is reason to *grant* plenary review), and it simply hypothesizes an implausible scenario in which some non-existent, future decision in the D.C. Circuit undercuts *Papagno*'s holding—by adopting a weak, atextual view of Section 3663A(b)(1) that has failed in other circuits and is incompatible with *Papagno*'s core reasoning.

This case easily checks off every traditional criteria for certiorari. Further review is plainly warranted.

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[8] As the government admits (Br. in Opp. 13), its new theory under Section 3663A(b)(1) was rejected and foreclosed by earlier Fifth Circuit authority, which is why it had to rely exclusively on Section 3663A(b)(4) below. See, *e.g.*, *United States* v. *Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002); cf. *United States* v. *Schinnell*, 80 F.3d 1064, 1070-1071 (5th Cir. 1996) (construing analogous coverage in Section 3663(b)(1)). The government does not explain why the D.C. Circuit might be more charitable with the government's dubious analysis.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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DECEMBER 2017